THE DECALOGUE JOURNAL

A PUBLICATION OF THE DECALOGUE SOCIETY OF LAWYERS

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On Freedom of Thought and Expression

"I have not been able to accept the recent doctrine that a citizen who enters the public service can be forced to sacrifice his civil rights. I cannot for example find in our constitutional scheme the power of a state to place its employees in the category of second class citizens by denying them freedom of thought and expression. The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher."

* * *

"We need be bold and adventuresome in our thinking to survive. A school system producing students trained as robots threatens to rob a generation of the versatility that has been perhaps our greatest distinction. The Framers knew the danger of dogmatism; they also knew the strength that comes when the mind is free, when ideas may be pursued wherever they lead."

Justice WILLIAM O. DOUGLAS

72 S. Ct. 380, at 392, 394

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BENJAMIN WEINTROUB, *Editor*

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IN THIS ISSUE

Nominating Committee Selects Officers and Board Members

In keeping with the Constitution and By-laws of our Society, The Decalogue Board of Managers at a special meeting held Monday, March 25, elected fifteen members to serve on the Nominating Committee to propose a slate of officers and fill several vacancies on our Board of Managers. The following members were elected to the nominating committee:

Samuel Allen	Solomon Jesmer
Paul G. Annes	Nathan D. Kaplan
Archie H. Cohen	Roy I. Levinson
Richard Fischer	Oscar M. Nudelman
Elmer Gertz	Morton Schaeffer
Alex Golman	David F. Silverzweig
Harry A. Iseberg	Carl B. Sussman

Benjamin Weintroub

After two meetings at the offices of our Society, April 1 and April 7, the nominating committee selected the following as candidates for office and members of our Board of Managers:

President: Harry A. Iseberg
First Vice-president: Paul G. Annes
Second Vice-president: Elmer Gertz
Treasurer: Harry H. Malkin
Financial Secretary: Henry L. Burman
Executive Secretary: Richard Fischer

The Committee selected the following candidates for members of the Board:

Judge Samuel B. Epstein	L. Louis Karton
Matilda Fenberg	Michael Levin
Alex M. Golman	H. Burton Schatz
Leonard J. Grossman	George M. Schatz
Solomon Jesmer	Maynard Wishner

President Archie H. Cohen presided at both meetings of the Nominating Committee. The annual meeting of our Society at which all candidates are to be formally elected will be held May 23 at a luncheon, at the Covenant Club, 10 N. Dearborn Street. Installation of officers is to take place June 20, also at the Covenant Club, at a noonday luncheon.

Address of Welcome

Statement of President Archie H. Cohen who presided at The Decalogue Society of Lawyers Seventeenth Annual Dinner at the Palmer House March 1st, at which The Decalogue Award of Merit was presented to Judge Harry M. Fisher.

. . . From its inception The Decalogue Society of Lawyers has, on the occasion of its annual patriotic affairs, paid homage to George Washington and Abraham Lincoln, great Americans who served their country with unswerving loyalty and devotion. These men did not merely commit the Golden Rule to memory, they practiced it, and by their splendid example inspired a love for God and for man.

America was founded on the theory of liberty; liberty for every man to live his own life in his own way, subject only to the rights of others, to enjoy the blessings of political liberty, liberty of religion, liberty of conscience. It was natural that the oppressed of other countries, should have come to this land of freedom by the millions; come to fuse together into a new race; come to mould a higher and better civilization. Protestants, and Catholics, and Jews have come and have found a welcome.

The world's well being depends upon these three concepts—Justice, Truth and Harmony and in our democracy the test is *what you do, how you act* towards your Government and its institutions and your friends and neighbors, is more important than what you say, because patriotism is a heart stimulant and not a mouth wash.

I maintain that the American way of life is the most desirable way of life. We appreciate that the development of this way of life has been rapid, but it is by no means complete. Much remains to be done. *What is done* and *how it is done* depends largely *upon us and our desire to see it done.* I agree, that it is a tremendous undertaking. It takes courage, stamina, and above all a faith in the belief that we are all acting in the interest of the general welfare.

We behold the world in turmoil, with many ancient landmarks uprooted and this *is as true,* no more, no less, *of the law,* than of the world society.

If the judicial system is the rock upon which our liberties are founded, then it is the business of this and every bar association to stand firmly against all proposals to *by-pass* the judicial system, or to substitute for judicial decision any degree of administrative finality, and to insist that in the administration of both personal and property rights, that there shall always be adequate judicial review.

There never was a time when it was so necessary for Americans to stand together against a danger that threatens all of us; that threatens the very core and substance of our America. We must not forget that eternal vigilance is still the price of liberty. There is nothing so much that we in the United States can do to promote peace, good will and tolerance throughout the world *as to show to the world an example* of the kind of government that peace-loving, liberty-loving people can have, *if they will* a government which recognizes the dignity and worth of the humblest of humanity and which values freedom of thought and speech of all men regardless of their race or religion.

As lawyers it is our imperative duty to preserve and defend the Constitution of the United States of America because the American Republic will endure only so long as the ideas of its founders continue to be dominant in our thoughts. The Decalogue Society of Lawyers feels that laws are the rules established by men of good will to produce the greatest contentment to the greatest number in a world and that otherwise *there would be no order.* We urge that the law must always have as its indestructible goal the burning resolve that the lowliest of man can come before it and be judged without prejudice, without malice, without contempt.

Tonight we are assembled to bestow an Award of Merit upon a loyal American citizen, a great humanitarian, an outstanding jurist, a devoted Jew, in recognition of a useful and purposeful life.

A Judge's Vision of an Ideal Judge

An address by Judge Harry M. Fisher before The Decalogue Society of Lawyers on the occasion of the presentation to him of The Decalogue Award of Merit for 1951 at the Palmer House, March 1, 1952.

Judge Julius J. Hoffman of the Superior Court chosen by our Society to present the Award, discussed, at some length, the judicial philosophy of Judge Fisher. Among other things, he said: "Judge Fisher has been unremitting in his search for truth and he has not allowed his quest to be obscured by the possibility that the action might have unfavorable results for himself. . . ."

. . . Long, long ago, when we lived in that peaceful and simple world which has since disappeared, I was admitted to the bar—an altogether unexpected privilege, considering my humble background. That filled me with hopes and dreams of a bright career in my chosen calling. One ambition always dominated my behavior—an ambition to gain and to hold the respect and approval of the members of my profession.

Later, when fortune contrived to place me on the bench, I began to dream of earning the respect of my brother judges and of the larger community which was made aware of my existence. This evening excites a belief that I have not entirely failed. And even though I never acquired the material substance by which our age measures success, my beloved family need not suffer too much disappointment. The host of friends that I have amassed, in and out of the profession—their respect and regard—and the moderate community approval which I enjoy—these constitute far more satisfying riches than any amount of monetary accumulations.

But I am talking too much of myself, and I shall therefore proceed with my confession of faith. I have remarked about a world we knew when I was admitted to the bar. Two major wars, an unparalleled economic depression between them, fear and ideological conflicts following them—all these have changed that world beyond recognition.

The young men and women now moving toward maturity know very little of the civilization into which their parents were born. The law, too, has undergone revolutionary changes. The legislative bodies of the country have slowly but progressively followed in the path of many of the major social and scientific developments. But the judiciary, particularly of the states, have remained inert. Even in their construction of the new legislation, they allowed the old common law to influence them over and over again, with results which not infrequently rendered such enactments completely innocuous.

Bacon's qualifications of the ideal judge are no longer sufficient. His judges labored under ideal conditions. Litigation was limited, the judge sat infrequently and when an exceptional case appeared, there was nothing to prevent his careful study of it.

His mental processes did not suffer continual shocks consequent upon violent change. History moved at a snail's pace. Whereas in our day the rapid movement of the social, economic, political and scientific forces demand that everything, including the judicial process, be streamlined and that new techniques be developed. But the major portion of our judiciary continues to pay homage to the world that has disappeared and to the judges who lived under civilizations *sans* big business, *sans* big unions, *sans* big taxes, *sans* big crime syndicates.

It is so easy to follow precedent. It is such a comfort to find a case on all fours. What matters who the old judge was or what were his experiences, social vision and cultural background, or that he lived or lives under conditions utterly alien to ours—the fact is he has given expression to wisdom which one can apply to the case at bar.

Sometimes I fear we have lost the courage, in view of our sanctification of the old, to override a former decision or to venture out upon untried paths. At times I sense a feeling akin to envy when I think of some of the great English judges who never hesitated to invent new remedies or to infuse new life into their judicial pools whenever they became stagnant. Extraordinary remedies, injunctions, receiverships, specific performance and the entire schedule of equitable relief were judicial contrivances made to meet new situations. In their heavenly abodes they are probably looking with astonishment upon the discovery that they are credited with having written additional holy scripture.

But the modern judges, who live in an age of incredible discovery and endless inventiveness, have stopped inventing. We revere the decisions of the preceding generations of judges as if they were seers, capable of evaluating the conditions of our life better than are we who live it. We seem to be committed to the proposition that the creative ingenuity of the courts of equity has been exhausted, and as a result of it chancery precepts have become as rigid as the common law precedents.

One illustration will suffice. During the depression, when more than a third of the real estate in Cook County was foreclosed and the owners of the equity were not only deprived of their interests in the property (which in the vast majority represented their life's savings) but in most instances suffered deficiency judgments. A chancellor in our jurisdiction held that it was within the competence of the court and in harmony with established equitable principles to delay entering a foreclosure decree until a real estate market would redevelop.

His order was simple. It allowed the owner of the equity to remain in possession of the sequestered property and to act as the representative of the court, as if he were a receiver, the net proceeds to be

applied toward the reduction of the debt. That decision was reversed; the court characterizing it as an unpermissible judicial moratorium. Within a few months after the reversal, the Supreme Court of the United States held that even a legislative moratorium under such circumstances about which there is a serious question of validity was valid. But in our state the process of robbing the distressed equity owners continued unabated while a small group of trustees, bondholder committees, receivers and other carrion crows fattened upon the carcasses of a moribund economy.

I do not mean that each judge should become a law unto himself or that we should nullify the accumulated legal wisdom of the ages. Such principles and decisions as remain valid and suitable to the genius of our generation we should respect and follow. What I am insisting on is that it is not enough to have judges who are conversant with the laws that suited the genius of bygone generations.

We need judges capable of differentiating between valid precedents and those which are no longer valid, judges who have the courage to reject the latter and invent new ones. My objection is to uncompromising worship of rules that are old and decisions which have lost contact with reality.

Laws are but limitations upon the freedom of human behavior prescribed by the authorities who have the power to enforce them. In a democracy laws derive their justification from the traditions of the people. But precedents are not necessarily traditions. A judicial precedent is merely a previous decision or method of proceeding which may be taken as an example or rule of justification in subsequent cases. It should be authoritative only when the circumstances are identical or at least similar. But under changed social and economic conditions the identity and often the similarity disappear.

It is otherwise with tradition. It comes, as it were, out of the soul of a people. It represents the generally accepted customs, beliefs and usages which are handed down from generation to generation. Its force lies in the continued voluntary acceptance of it. When a tradition changes it means that we no longer accept the old. When a precedent is disregarded it means that we simply refuse to follow a former opinion of one or a number of preceding judges.

Courts are constituted for the maintenance of internal peace, for the safeguarding of each individual's and society's security with justice, for the interpretation and enforcement of the prescribed rules of human conduct intended to sustain the civilization of their age. Since the personality of the judge inescapably enters into almost every judgment that he makes, he ought to be competent to feel the social climate in which the law operates.

His social, economic and political views, wittingly or unwittingly, constitute part of the processes which lead him to his conclusions. Unless he understands that laws which do not harmonize with the dictates of justice in his day can become as tyrannical as the fiats of an absolute monarch, his judgments may become just as oppressive. The recluse may become a great legalist but never a good judge. To be a good judge he must live with and within the society whose laws he administers.

The architects of our republic, in their anxiety to establish justice, promote the general welfare and secure the blessings of liberty to their posterity, created a government of checks and balances. The task of preserving their majestic structure was not intrusted alone to the legislative and executive departments, but to the judiciary as well.

I said that the legislative departments of the states have responded measurably to the demands of our modern civilization. This is true largely in matters which are pressed by organized groups or organized public sentiments. But the laws relating to private rights and obligations have had scant attention even of the legislators. In the matter of liability for torts, for instance, we are still governed by the rules laid down when there were no railroads, motor vehicles, electricity or any other frightening mechanical instrumentalities.

In the performance of his official duties a judge stores up an uncommon lot of invaluable experience. His court is a laboratory where laws are tested and evaluated, and a clinic where remedies are applied. He is constantly learning at public expense. The knowledge and experience he thus accumulates are public assets and unless he shares at least part of it with the society which he serves, the value of that asset is dissipated, and we just can't afford to waste that material.

If the law is to be a living, healthy institution, the judges, being in the best position to discover its defects, must constantly be in search for remedies. Where they are not at liberty to apply them as judges, they should as patriotic citizens bring to bear the force of their prestige and experience upon the legislators and induce them to provide the necessary cures.

"Law" and "justice" are not always identical terms. Neither is the law always an instrument by which justice is attained, but I deny that this need be so. I deny the validity of the argument that certainty and fixidity of law is such an indispensable necessity under all circumstances that it should be purchased at the cost of justice. A law not rooted in justice is tyranny and should be rooted out.

By your gracious award you indicated that you found merit in my official performances in the general community and, separately, in my services to the Jewish group. It would, therefore, not be inappropriate to mention some special contributions that the Jewish lawyer can make to the growing idealism of our country.

By its very name this society of lawyers proclaims its interest in those spiritual concepts which we inherited from our forebears. The scientists distinguish between inherited characteristics of an individual and his acquired characteristics, and while I am certain that there are no biological differences between ethnic groups, I feel, nevertheless, that with a people whose

history has run in a continuous course for thousands of years, their acquired characteristics become inborn and are passed on from generation to generation with the strength of inherited characteristics.

Because our group has long endured the rigors of history, the weak and those whose behavior did not harmonize with our mode of living have succumbed. Only those who were strong enough to bear the heavy burdens and whose instincts harmonized with the characteristics of the group, survived. These characteristics, represent our moral strength. Now that we live in freedom in this blessed country it is our happy privilege to contribute to its harmony our special ethical and moral cadences. Our country rightfully demands it of us and we owe it.

The Decalogue, whether divinely revealed or just a product of Jewish genius, is not simply a constitution of a national group. It is the seed from which the divinity in man grew and flowered. It has become engrained in the Jewish mental processes as if its words were carved upon each mind separately. Law obedience is part of the behavior pattern of every self respecting Jew. To study the Torah, the law, is a binding mandate issued to us in these terms: "And these words which I command thee this day shall be in thine heart: And thou shalt teach them diligently unto thy children, and shall talk of them when thou sittest in thine house and when thou walkest by the way and when thou liest down and when thou risest up." These words were spoken by the great law giver in the childhood days of our people and have remained as a guide to living during the centuries.

The command to care for the widow, the orphan and the needy, *not as a matter of charity*, but as elemental justice, has survived to this day.

The law of the Passover which requires annual reminder of the liberation from slavery has characterized our group with an unquenchable passion for freedom and utter abhorrence of human exploitation. Each year at the seder we tell our children: "We were slaves unto Pharaoh in Egypt and the Eternal brought us forth from thence." Each of us is commanded to regard that historic episode as if he were personally there when it happened and participated in the blessed liberation.

The laws relating to human equality have never been forgotten by our people, not even during centuries of darkness when they had become extinct in the dominant civilizations. Over and over again the Bible reminds us that all the laws apply with equal force "to the stranger and to those who sojourn in your midst."

The Sabbath which was the first legislative social measure enacted for the preservation of the dignity of man and the worth of each individual life has become the very core of the civilization of our group.

These are but illustrations of the character of our inheritance. Intuitively, Jews in this country—and more especially Jewish lawyers—have initiated or have been in the front line of advocacy of much of its social legislation. It was through no accident that a Brandeis was able to influence our courts to sustain a new type of Sabbath—compulsory rest for working women—or that the court upon which he and Cardozo served, repudiated the barbarous legal concept that labor is a commodity to be bought and sold in the market place at bargain prices.

The special privilege, therefore, of the American Jewish lawyer is to become imbued with the ethical, moral and social values of his people and to contribute the spirit of it to the legal lore and the multicolored culture of America.

In Jewish folklore there are many legends concerning the Torah—The Law. The most popular is that the Torah is older than the world; that it existed some 2000 years before creation; that since it was wisdom itself, God consulted it before creating the world; that it was revealed in the language of all the peoples and was given for all mankind and that Israel was chosen as its guardian.

To this legend I have a postscript.

Israel has been dispersed among the nations of the earth. It carried its sacred inheritance with it and guarded it at the cost of suffering and martyrdom. Nowhere were its teachings accepted until God revealed the existence of an unknown continent and gathered upon its soil descendants from all the peoples of the earth—Jews included who agreed to share the divinely inspired principles—principles of peace, justice, freedom, equality and respect for human dignity and human rights. And because of this the land was blessed.

You might say that some of the thoughts expressed here are utopian. But let us take another lesson from our Jewish forefathers. When they began building a new civilization they did not follow the example of the Medes and Persians whose "laws altereth not." They wrote a code of fundamental laws for their governance in the promised land which they were about to enter; and in addition to it, they set for themselves future goals—the Messiah would come, and with Him the perfect day and the abundant life. The people must forever strive to hasten the coming of that day, whether they live to see it or not.

I believe therein lies the greatness of the immortal prophets. Let us emulate them. Let us set for ourselves goals which, even though they may seem to be unattainable, we should nevertheless forever strive to attain. The Messiah may yet come.

The Editor will be glad to receive contributions of articles of modest length, from members of The Decalogue Society of Lawyers only, upon subjects of interest to the profession. Communications should be addressed to the Editor, Benjamin Weintroub, 82 West Washington Street, Chicago 2, Ill.

Trade-Marks and the Lanham Act

By MAX RICHARD KRAUS

Member Max Richard Kraus is a veteran patent attorney and former Executive Secretary of our Society.

A "trade-mark" as defined in the Federal Trade-Mark Act of 1946, commonly known as the Lanham Act [1], "includes any word, name, symbol, or device, or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others."

Natural products, such as minerals or spring water, fruits, vegetables, trees, and the like, may be identified by trade-marks.

A trade-mark is not acquired merely by registration of the same, either in the United States Patent Office or in any of the States. There are three prerequisites to the acquisition of a good title to a trade-mark. First, the mark that is selected must be capable of appropriation as a trade-mark; second, it must be applied to the goods, or their containers, or the displays associated with the goods, or on tags or labels affixed to the goods, and third, the commodity so marked must be sold on the market. In this way only can a name or device become a valid trade-mark.

Prior to passage of the Lanham Act, registration of marks was limited to marks used on goods or products, and the mark had to accompany them physically in order to distinguish their origin. Under the Lanham Act, for the first time, other marks such as "service marks," "collective marks" and "certification marks" were given protection by registration.

Persons who sell services rather than goods may have marks and slogans registered. The term "service mark" is defined as

"a mark used in the sale or advertising of services to identify the services of one person and distinguish them from the service of others, and includes without limitation the marks, names, symbols, titles, designations, slogans, character names and distinctive features of radio and other advertising used in commerce."

Recently "Gorgeous George" was granted a service mark registration on this name to cover the field of entertainment service in the nature of wrestling exhibitions. "Studio One" and other radio and television programs have likewise been granted registrations.

A "collective mark" is defined as a trade-mark or service mark used by the members of a cooperative, an association or other collective group or organization, and includes marks used to indicate membership in a union, an association or other organization.

A "certification mark" refers to a mark used upon or in connection with the products or services of one or more persons other than the owner of the mark, to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of such goods or services, or that the work or labor on the goods or services was performed by members of a union or other organization.

It is priority of use and not priority of conception which creates the right to the trade-mark or mark. One who first conceives or coins a trade-mark or mark but does not put it into use as a trade-mark or mark acquires no rights as against the actual first user of the same.

TRADE-MARKS:—It is an essential condition of acquiring legal rights to a trade-mark that it be not already in use by another or by others. Thus, a claimant of a trade-mark is not necessarily prejudiced by earlier use of a term in a different and separate territory or on a different class of goods. A trade-mark which has been used, but which has become abandoned may be adopted and used by another, and an abandoned trade-mark may be reacquired by the former owner only if he resumes its use before the rights of others have intervened, that is, before the trade-mark he abandoned has been adopted by a stranger.

The right to a trade-mark is a limited one, in the sense that others may use the same mark on non-related goods, that is, on articles of a different character and description. However, articles of merchandise which once were considered unrelated and which formerly would not have been considered as having had the same origin now may come from the same factory or be handled by the same merchant and the law does recognize these changes.

[1] Chapter 22, Title 15 of U. S. Code.

The standards set by the courts in the early cases, such as that in 1912, which held that the Borden Milk Company could not restrain the use of the name "Borden" on ice cream [2] is no longer accepted, and the courts generally have expanded this doctrine so that now wholly unrelated goods are given protection by the first trade-mark owner. Judge Learned Hand has characterized the second user of a trade-mark as a "borrower" and has stated the rule to be that "unless the borrower's use is so foreign to the owners as to insure against any identification of the two, it is unlawful." [3]

Words, names, or devices used as trade-marks, differ in degree or exclusiveness of appropriation, and, therefore, in the extent of protection to which the user is entitled. A coined word such as "Vaseline" or "Kodak," never before used in any fashion, is potentially more exclusive than a word taken from common speech; and a word already in the language, but never or seldom used as a trade-mark is potentially more exclusive than one which has been used by many manufacturers and merchants for a great variety of goods.

Names like "Blue Ribbon," "Gold Medal," "Star," and the like, are used by numerous companies and on numerous products. Such marks connote high merit, first prize, or best quality. The courts limit and restrict such trade-marks substantially to the products on which they are used, as contrasted to arbitrary or coined words which are given broader protection.

"Blue Ribbon" beer is offered to the public by one concern, and "Blue Ribbon" malt extract by another. The prior user brings suit but is denied relief.[4]

"Budweiser Beer" is offered by one concern, and "Budweiser Malt Syrup" by another. The prior user is granted relief. The difference between the two is explained in the decision of the Court of Appeals of the Seventh Circuit.[5] Budweiser had no significance in this country outside of its true trade-mark value, while the public had come to recognize the term "Blue Ribbon" as denoting high merit in a descriptive sense. The court therefore restricted it to the specific goods on which it was used.

A descriptive trade-mark, namely, one that describes the character, quality or function of the product is given less protection than a non-descriptive mark. The same is true of trade-marks which are geographic terms, such as the name of a location, or a mark which is merely a surname or family name. While these marks are registered in the United States Patent Office, they must be exclusively used for longer periods of time and must acquire a secondary meaning before the Courts will enjoin their infringement.

One of the best known summaries of the "secondary meaning" rule was laid down by Judge Denison in G. & C. Merriam Co. v. Saalfield, 198 F. 369.

"It contemplates (secondary meaning theory) that a word or phrase originally, and in that sense primarily, incapable of exclusive appropriation with reference to an article on the market, because gographically or otherwise descriptive, might nevertheless have been used so long and so exclusively by one producer with reference to his article that, in that trade and to that branch of the purchasing public, the word or phrase had come to mean that the article was his product; in other words, had come to be, to them, his trade-mark."

The Lanham Act has provided for registration of trade-marks on two separate registers. Those trade-marks which comprise arbitrary or fanciful terms or devices are registered on the Principal Register which carries with it a prima facia presumption of validity and other substantive rights. Other marks which are used as trade-marks to distinguish goods, and have been used for at least one year prior to the filing of the application, are registerable on the Supplemental Register. Such marks include descriptive terms, geographical names, surnames, configuration of goods or their packages, slogans and phrases. However, such registration carries with it no prima facia presumption of validity.

The Lanham Act, however, provides that after a mark has been registered on the Supplemental Register and has been exclusively and continuously used for a period of 5 years, it may then be registered on the Principal Register. In adopting a trade-mark, it is always wise to adopt a mark which in-

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[2] Bordens Ice Cream Co. v. Bordens Condensed Milk Co. 201 F. 510.

[3] Yale Electric Corp. v. Robertson 26 F (2) 972.

[4] Pabst Brewing Co. v. Decatur Brewing Co. 284 F. 110.

[5] Anheuser Busch v. Budweiser Malt Products Corp. 295 F 306.

itially is of such character that it would qualify for registration under the Principal Register, rather than under the Supplemental Register. The Courts give better and broader protection to those marks which are fanciful and arbitrary.

In dealing with trade-marks which have been considered descriptive, the Courts have ruled that everyone has a right to designate a product by the term by which it is known. A new metal, for example, is discovered and it is called aluminum. Everyone has the right to use that name in referring to the article, for it would be against public policy to allow any one person to obtain a monopoly of this general or generic name. When the DuPont Company first patented their cellulose tissue product they called it "Cellophane." During the life of the patent, "Cellophane" became synonymous with the product, since DuPont had not referred to it by any other name. Upon expiration of the patent, another company produced the same product and likewise designated it as "Cellophane." The court held that the word "cellophane" was no longer a trade-mark identifying the product of the DuPont Company, but had come into public domain as a generic term.[6] Had the DuPont Company referred to the product as a cellulose tissue and stated that "Cellophane" was a cellulose tissue manufactured and sold by DuPont, then the court would have upheld DuPont's claim to the trade-mark "Cellophane." Subsequently, when the DuPont Company put out a new synthetic fiber product, it deliberately called it "nylon" and it itself adopted another trade-mark for it. "Aspirin" has a history almost identical with "Cellophane." During the life of the patents the product was known as "Aspirin." Upon expiration of the patents the name became public property.

In the absence of secondary meaning, the law of unfair competition does not protect a name which is truly descriptive of the article or its generic name unless fraud is involved. Usually relief is not granted where a rival uses a name which is reasonably descriptive of his product. Such generic names may not be exclusively appropriated for they are publici juris. Words of this character, for example, would be, "Flaked Oatmeal"—"Whirling Spray"—"Air Cushion," and names of similar character, for it can readily be seen that they define a characteristic or quality of the product and such marks are not subject to exclusive appropriation.

The courts have repeatedly ruled that every man has a right to use his own name as a trade-mark for his product, and even have given the second user the same right, provided the second user has not used it for the purpose of wrongfully appropriating the goodwill of the prior user, nor to commit a fraud, nor to trespass on the prior user's property. In many instances, the courts have required the second user to distinguish in some manner, as by the use of explanatory phrases as "not connected with" and the name of the prior user, or restricting its use to certain specified manners. Where a personal surname becomes so identified with a business as to become practically synonymous with it and has acquired a secondary meaning, the courts will usually grant relief on the basis of unfair competition. However, under the Lanham Act, a continuous and exclusive use for 5 years of a surname, and registration thereof on the Principal Register creates a prima facia presumption of validity of the trade-mark.

Geographic terms as trade-marks are likewise given protection and may be placed in the same category as descriptive marks and surnames, insofar as their recognition by the courts are concerned. Geographic terms are descriptive terms to the extent that they may indicate the place from which a product comes or where it is manufactured, or where the maker or dealer has his place of business. No one can obtain such an exclusive right to the use of a geographical term so as to prevent others who inhabit the same geographical district or who deal in similar articles coming from that district from truthfully using the same designation.

However, if a geographical term has been long and exclusively and intensively used as a trade-mark, and its association has grown up in the public mind with that of a specific manufacturer of a product, the courts will protect it. The Waltham Watch Company used "Waltham" as a trade-mark. Obviously, the public seeing the term "Waltham" on a watch usually understands it to mean a watch made by the

[6] DuPont de Nemours & Co. v. Waxed Products Co. 85 F (2) 75.

concern that has long made the Waltham watches. Yet others have the right to make watches in Waltham and so state it, but they may not indicate that fact by use of the name Waltham in such a way as to confuse the public in its present understanding and use of the name to indicate watches made only by the old Waltham concern. They may use the name as an address to indicate their location and to tell where the goods are made or sold.

The passage of the Lanham Act in 1946 has done much to clarify and solidify substantive trade-mark rights. Trade-marks which are used in interstate commerce should obviously be registered in the United States Patent Office on the Principal Register if they so qualify. In the absence thereof, registration should be attempted on the Supplemental Register, and then after 5 years of continuous and exclusive use, transferred to the Principal Register. Registration on the Principal Register carries with it certain very valuable rights, such as, prima facia evidence of validity of the trade-mark, and constructive notice of the registrant's claim of ownership; also, after 5 years of registration on the Principal Register and continuous use of the trade-mark, it becomes incontestable, which gives the trade-mark owner a certain degree of security in the ownership of the trade-mark.

Distinctive containers for merchandise or configurations of goods that function as trade-marks may now be registered on the Supplemental Register under the Lanham Act. Previously, many such distinctive containers were protected by Design patents. Since Design patents have a maximum life of only 14 years, after their expiration such containers could be copied by competitors. Federal trade-mark registrations are granted for a 20 year period and may be renewed at the end of such period for a similar period as long as the trade-mark is in use, therefore, distinctive containers that function as trade-marks of origin should be registered under the Lanham Act.

The Lanham Act has caused more trade-marks to be registered and has thus made available a fairly complete roster of trade-marks which can be searched and should be helpful in avoiding the adoption of trade-marks already in use.

APPLICATIONS FOR MEMBERSHIP

BERNARD EPTON, JOSEPH SOLON, SEYMOUR VELK, *Co-Chairmen*

APPLICANTS	*SPONSORS*
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Sidney W. Mandel	S. Edward Bloom
Marvin Pollack	Reuben Flacks & Ben Levinson

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Alan David Katz	Bennett H. Shulman
Fred Lane	Martin L. Silverman
Ned Langer	I. R. Sondler
Seymour J. Layfer	Blanche Stein
Philip Z. Levinson	Daniel P. Tunick

HOSPITALIZATION

L. Louis Karton, chairman of The Decalogue Hospitalization Committee reports that the current enrollment of Decalogue members into the Reserve Insurance Company closed March 23, 1952. New applications may be sent to the Reserve Insurance Company, 180 W. Adams St. but that these will not be in effect until a new enrollment period is opened late in the Fall. The Decalogue Journal will publish announcements of exact date of the reopening. A considerable number of members of our Society joined this hospitalization plan.

MAURICE J. NATHANSON

A citation of merit for activities in behalf of veterans was presented last month to member Maurice J. Nathanson, past national vice-commander of the Jewish War Veterans, by the Gorod-Hurwitz post of the J.W.V.

Member Nathanson, long known for his community activities, is a former assistant corporation counsel.

Becker and Merriam on Chicago Problems

By SAMUEL D. GOLDEN

The Decalogue Forum Committee, Bernard H. Sokol, chairman, sponsored a luncheon meeting on March 14, 1952, at the Covenant Club featuring addresses by Chicago Aldermen Robert Merriam and Benjamin Becker on the subject "What's Going on in Our City?"

Alderman Merriam stated that little improvement has occurred since the wave of public indignation to the murder of Charles Gross, but that there has been promise of a beneficial effect in the awakened interest of many people who previously had paid little attention to local affairs. The alderman asked, "Where should we place the blame for the fact that in Chicago, perhaps more than anywhere else in the country, there has grown up a corrupt "system" involving the political parties, public officials, and city government?" The answer, he said, is that the public itself has been too apathetic toward efforts to modernize and clean up our city and county; in the public's apathy, a power vacuum has arisen and undesirable elements have slipped into it.

Merriam felt that the creation of a special city council committee to investigate political tieups with crime was a very encouraging step. This committee's first investigation, he believes that of the police department, should prove very fruitful. One definite step that could result in much improvement, he said, would be the appointment of an able civilian police commissioner.

Alderman Merriam told the audience that lawyers can help in the campaign against corruption. He said, "You gentlemen may run across certain activities that would be of great help to the 'Big 9' and 'Big 19' to know about. I urge and implore you to make these known so that proper action can be taken." Merriam concluded, "Somebody has to take the blame for what has been going on. Now is the time to call a halt."

Alderman Becker, a member of The Decalogue Society Board of Managers, spoke of the difficulties of proceeding with a campaign to improve the city; reading newspaper stories of public dishonesty day after day we sometimes wonder whether the effort is worthwhile. "Every good fight," he said, "is worthwhile. Some persons may have to pay in health and in foregoing material things. But in the long run, we make headway."

As a result of the tenacity of a few aldermen, and wide public and newspaper support, definite gains have been made in the City Council against overwhelming odds, Becker said. He cited as examples the passage of the Anti-hate Ordinance, and the greatly improved police methods of dealing with racial violence. In the hearings upon the City budget, the "economy bloc" aldermen put forward a number of serious proposals for reducing the budget and allowing needed salary increases for policemen and firemen. The aldermen fought hard, but the council majority and the mayor simply turned down all these proposals and accused their advocates of "looking at the next election." Nevertheless, because of the wide publicity given to the budget hearings, a number of the economy bloc's suggestions have been quietly adopted within the last few months.

Becker said the prevalent approach to government in Chicago has been one of selfishness and expediency: not how to make our government the best in the country, but what the individual can "get" out of it. Because of this attitude, Becker declared that the public clamor that has resulted from the Gross murder "is the healthiest thing that ever happened to Chicago. It is a sort of blood-letting. The people are awakening, and we have got to keep them awake."

First Vice-president Harry A. Iseberg, who in the absence of President Archie H. Cohen presided at the meeting, thanked the speakers for their able presentation of the subject and stated that the Society has always been interested in civic betterment.

A Canadian's View of the American Jury

By LOUIS D. MOROSNICK

Member Louis D. Morosnick practices law in Winnipeg, Canada.

During my infrequent journeys to your country, I have visited your courts. Interested in the procedure for the administration of justice, I have spent many hours as a spectator at the trial of cases.

In your criminal courts the first thing that struck me, a Canadian lawyer, is the informality, the camaraderie, and the banter between counsel and the judge.

I attended one of the sensational criminal trials in Chicago and was startled to observe that counsel examined and cross-examined each juror as a matter of right; probing the antecedents, associations and habits of the juror, his acquaintance or friendship with counsel on either side or with the accused, and delving at great length into the prospective jurors philosophy of life—whether he has any prejudices about colour, creed, etc. I recall one of Chicago's outstanding lawyers occupying an interminable time questioning prospective jurors. He spent more than a day selecting the jury.

Our courts take it for granted that a juror is impartial as between the prisoner at the bar and Our Sovereign Lord the King (the State). The presumption goes further; that the juror having taken an oath will abide by his oath and judge the prisoner according to the evidence presented in court and that he will give a true verdict according to such evidence. The jury is, of course, charged or instructed by the presiding judge on the law applicable to the particular case. They are instructed that they take the law from the Court but that they are the sole and absolute judges of fact.

In Canada the average jury is selected in a matter of minutes; it rarely takes more than an hour. Counsel cannot interrogate the juror unless he has challenged him for cause. The procedure before our courts is as follows:

"Everyone indicted for treason or for any offence punishable with death is entitled to challenge twenty jurors peremptorily.

Everyone indicted for any offence other than treason, or an offence punishable with death, for which he may be sentenced to imprisonment for more than five years, is entitled to challenge twelve jurors peremptorily. Everyone indicted for any other offence is entitled to challenge four jurors peremptorily."

"The Crown shall have the power to challenge four jurors peremptorily, and may direct any number of jurors not peremptorily challenged by the accused to stand by until all the jurors have been called who are available for the purpose of trying that indictment.

The Crown may not direct any number of jurors to stand by in excess of forty-eight unless the judge presiding at the trial, upon special cause shown, so orders.

The accused may be called upon to declare whether he challenges any jurors peremptorily or otherwise, before the prosecutor is called upon to declare whether he requires such juror to stand by, or challenges him either for cause or peremptorily."

Challenge for cause:

Every prosecutor and every accused person is entitled to any number of challenges on the ground:

(a) that any juror's name does not appear in the panel; Proficed that no misnomer or misdescription shall be a ground of challenge it appears to the court that the description given in the panel sufficiently designates the person referred to;

(b) that any juror is not indifferent between the King and the accused;

(c) that any juror has been convicted of any offence for which he was sentenced to death or to any term of imprisonment with hard labour or exceeding twelve months;

Or

(d) that any juror is an alien.

2. No other ground of challenge for the cause than those mentioned in the section shall be allowed."

The only circumstance which permits counsel to examine or cross-examine a juror is that a challenge has been made for cause. In that cause two jurors already sworn or two men on the jury panel are selected to try the issue on the charge against the juror. The party exercising the challenge must produce evidence in support of his charge and may then, and then only, examine or cross-examine the juror in support of his charge. If his charge is proved the juror is dismissed. If the charge is not proved the juror is eligible for jury service but counsel may then use one of his peremptory challenges. The procedure of selecting the jury and the names of the jury on the panel are of course kept secret and not divulged to the public. Provision, however, is made so that a

superior court Judge may be moved for an order to publish the names on the panel if the judge is satisfied that the application is bona fide and necessary in the interests of justice.

One unaccustomed to the practice of cross-examination of a juror as is done in some jurisdictions, at least in the United States, can see in this practice a great danger. It is, I believe, a dangerous thing to permit jurors to be interviewed for any reason whatsoever. Unscrupulous men—and there are such everywhere, lawyers not excepted—may, can and in some instances attempt to bribe or corrupt the prospective juror. Unscrupulous and indifferent practitioners may employ investigators for such purposes and law enforcement officers may do likewise. Such a law in my opinion is dangerous and not in the public interest.

Our procedure is much more formal. The courtesies extended by the bar to the bench are reciprocated by the bench. We find that such formality lends dignity to the proceedings, enhances the position of the Court and strengthens the administration of justice. There is no room in our country for moving pictures and flash-lights in court proceedings.

These informal observations, no matter how pertinent, are not to be taken as a criticism of your procedure nor as praise of ours. I am only pointing out some of the more conspicuous differences in the procedures between the United States Courts and those of Canada.

AGAINST DISCRIMINATION

A bill to enlarge the scope of powers of the New York State Commission Against Discrimination was signed last month by Governor Thomas Dewey.

The new law expands the jurisdiction of the Commission, which has been limited to date to employment, into the area of public accommodation in such places as hotels, stores, theatres, restaurants and hospitals.

CONGRATULATIONS!

Member Henry L. Burman, Master in Chancery, Superior Court, has been nominated by the Democratic Judicial Convention for a Judgeship on the Superior Court.

A like honor—a place on the Circuit Court bench—was bestowed upon member Julius H. Miner, formerly a Circuit Court Judge, by the Republican Judicial Convention.

DECALOGUE AWARD TO JUDGE HARRY M. FISHER

JUDGE HARRY M. FISHER (center), recipient of The Decalogue Society of Lawyers Annual Award of Merit for 1951, at the Palmer House, March 1. Judge Julius J. Hoffman (right) presented the award. President Archie H. Cohen is shown congratulating the judiciary.

A Code for Hearings

The New York State Bar Association advocates a code of procedure for all Congressional and executive department hearings and a uniform system of rules for Congressional investigating committees and subcommittees. In both cases the association would ban photography, radio and television, except in the case of public hearings on pending legislation. In the case of character investigation the person questioned would have the right of confrontation, cross-examination, representation by counsel and summary for the record.

There can be no question of the motives behind these proposals. They are in defense of individual human freedom. They seek to take the circus aspect out of some hearings, on the one hand, and, on the other, to assure to every citizen the protection of the Bill of Rights, to which he is entitled. Louis Waldman, offering the resolutions, stated this latter point with telling force when he said:

"There are not two Bills of Rights, one for sinners and a different one for saints. From the standpoint of civil rights there are no such people as racketeers and non-racketeers, Communists and anti-Communists. There are only human beings with rights, privileges and immunities guaranteed to them by the Constitution."

That sort of statement is the best possible answer to those who charge "hysteria," as Mr. Waldman pointed out. It is also a needed reiteration of the broad base of human liberty and dignity on which our society is founded and which must be preserved. If a uniform code is required to effect that preservation or will even assist in emphasizing the rights themselves it should be adopted.

In respect to the radio, television and photography provisions, however, there is need for caution. In our complex society they have now become part of the word "public." They are actually merely an extension of the physical presence of the citizen. There are times when that physical presence is highly desirable. It would be a disservice if this move on the part of the association should be diverted into a general restriction on public participation in public affairs through these relatively new media.

It cannot be denied, for example, that the television presentation of the "Month of Malik" in the Security Council was one of the best things that ever happened to public opinion in this country. Similarly it will be hard to make a good case against the total impact of the televised Kefauver hearings. What is needed is discretion. Let us not impede that which is good while seeking to root out that which is evil.

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. . . For the task in truth is one to baffle the wisdom of the wisest. Law is the expression of a principle of order to which men must conform in their conduct and relations as members of society, if friction and waste are to be avoided among the units of the aggregate, the atoms of the mass. The expression may be false if those who formulate it, lawyer and judge and legislator, are blind to any phase of the life whose inner harmony they are commissioned to interpret and maintain. No one of us has a vision at once so keen and so broad as to penetrate these unsounded depths and gather in its sweep this enveloping horizon. We can only cling for the most part to the accumulated experience of the past, and to the maxims and the principles and rules and standards in which that experience is embodied. . .

The Growth of The Law
By Justice Benjamin N. Cardozo

The History and Development of Attorney's Fees

By OTTO C. SOMMERICH

Condensed by Member Louis J. Nurenberg from an article by Otto C. Sommerich in the November 1951 issue of The Record, a publication of the New York City Bar.

The first organized system of law, that of the Roman Republic, did not favor the rise of the profession of advocates or attorneys; each party in an action at law had to plead personally before the praetor, the "legal learned," official who prepared the formal documents and left the weighing of the evidence to an arbitrator (judex). With time, the legal system became more and more complicated, and after the Republic was succeeded by the Empire, the praetors became judges and the representation of causes was more and more entrusted to lawyers. The origins of representation can be traced to the relation of patrons or masters and clients, the latter being usually manumitted slaves to whom the patrons were obligated. For this reason it is now understandable that the patron could not receive payment. Moreover, the persons learned in law, who were willing to give legal advice, were mostly wealthy people, and these "orators" were more interested in the opportunity to appear in public, then to get paid for their day in court.

Later, it became the custom to give the patron an honorarium, as a voluntary gift; soon this became compulsory, at least in fact if not in law. Cicero boasted that he received for legal services an amount equal to at least a million dollars. Later, the so-called "Lex Cincia: De Donis and Muneribus" prohibited any compensation for representation before a court, but this measure met with no success. The Emperor Claudius limited the maximum to 10,000 sesterces (about $300.00) and within these limits, the fees were graduated. This is the legal recognition of attorney's fees.

Justinian provided for the legal enforcement of lawyer's actions for fees, provided that no contingent fees were allowed. The Canon, Papal law, Charlemagne in France, and Philip the Bold allowed attorney's fees. In 1579 the Paris Bar opposed a law by Henry III taxing exorbitant fees and this opposition led to a strike which was broken by royal decree.

In France, the avoues (solicitors) who do the paper work may charge fees set forth in a schedule called a tariff, but until 1889 the advocat (barrister) could not obtain fees except as voluntary and spontaneous payments. The advocat may not maintain an action for fees to this day, and neither avocat or avoue may demand contingent fees.

In England, there is no set scale for Counsel's (barrister) fees, and while he cannot sue for it, it would be unprofessional for a solicitor not to pay the fees agreed with Counsel's clerk. Solicitor's costs are set down in numerous and complicated scales; provided it is not contingent, he may enter into an agreement with his client for a round figure. Solicitors may be sued by clients for negligence; Counsel, never.

In the United States of America, it was never doubted that juristic advisers and legal representatives were entitled to obtain compensation for their work. However, the manner of calculating such fees was subject to many a controversy; Edwin Countryman in 1882 wrote a book favoring contingent fees. Justices Bradley and Cooley were opposed to "contingency" arrangements. In Backus v. Byron 4 Mich. 535 (1857) the Court held (as Justinian did) that contingent fees are a "malum in se." However, this practice was abolished by the legislature.

The State of New York preserved the differences between various types of legal advisers until 1848. The fees were regulated by statute and it was a penal offense for an attorney to charge more than these fees. In 1848, the fee bill was abolished and in Rooney v. Second Avenue RR Co., 18 N. Y. 368 (1858) the court stated: "What was before not only illegal but disreputable is now lawful, if not respectable."

In this connection, it must be stressed, however, that the attorney's right to receive fees was (and is still) considered a purely statutory right, and not a right based upon Common Law. In 1894, the New York Court of Common Pleas dismissed a complaint for fees by a Massachusetts attorney because pursuant to common law counsel fees were not recoverable.

In 1879, the N. Y. Code was amended to provide for a lien upon the client's cause of action or counterclaim. In 1899, the section was further amended extending the lien to a claim.

In Whittaker v. New York & C RR Co. 11 N. Y. Civ. Pro. 189, 195 (1886), the Court stated "The extent of the compensation of an attorney is governed by the agreement existing between him and his client, which may be express or implied. The former disability was removed by the Old Code and thereupon attorneys were left free to contract with their clients as to their compensation beyond the allowances given by statute."

In 1909, this section of the Code (Sect. 66) which succeeded the Old Code, was split up partly into Section 474, which reads in part, "The compensation of an attorney or counsellor for his services is governed by agreement, express or implied which is not restrained by law. . . ."

Today it is true that express agreement might include a retainer, a fixed compensation without regard to the result of the action, or contingent fees, a percentage of the amount actually recovered—a method called by the old Romans and still in European countries "quota litis" or a combination of both. Court decisions have limited the contingency to 50%. The implied agreement of course results in a calculation of fees on the basis of the actual work done by the attorney, in a reasonable proportion to the subject matter at Bar.

Thus, the development of the legal profession and compensation for legal services shows that from voluntary gifts, the line went steadily upwards until the attorney is recognized as a member of an earning profession. Freedom of contract is established between client and counsel. A far-reaching protection of his rights is the creation of a lien which may not be destroyed without his knowledge.

DECALOGUE LUNCHEON MEETINGS

On Friday of each week The Board of Managers of The Decalogue Society of Lawyers meets in a private dining room, for luncheon, at noon, at the Covenant Club, 10 North Dearborn Street. Members are invited to attend, listen to committee reports, and learn of the activities of our bar association. No reservations necessary.

Lawyer's LIBRARY

The *Editor* earnestly suggests close examination of the titles listed below.

New Books

Alexander Publishing Co. *Federal tax handbook.* 1952 ed. New York, The Author, 1951. $18.50.

Bowe, William J. *Tax planning for estates.* 1952 Revision. Nashville, Tenn. Vanderbilt University Press, 1952. 100 p. $2.00.

Briggs, Herbert W. *The law of nations: cases, documents, and notes.* New York, Appleton-Century-Crofts, 1952. 1140 p. $8.00.

Chafee, Zechariah, Jr. *Documents on fundamental human rights.* Preliminary ed. Cambridge, Mass., Harvard University Press, 1952. 3 v. v. 1, $3.00, v. 2, $4.00. (Vol. 3 to be published in the future).

Chambers, Merritt M. *Colleges and the courts,* 1946-1950; judicial decisions regarding higher education in the United States. New York, Columbia University Press, 1952. $3.00.

Commerce Clearing House. *Antitrust law symposium,* 1952. Chicago, The Author, 1952. 175 p. $2.00.

Howe, Mark De Wolfe, ed. *Cases on church and state in the United States.* Preliminary ed. Cambridge, Mass., Harvard University Press, 1952. 416 p. $6.00. (Offset)

Judicial Conference of the United States. *Procedure in anti-trust and other protracted cases;* a report adopted September 26, 1951. Washington, Administrative Office of the United States Courts, 1951. 40 p. Apply.

Little, Paul. *Federal income taxation of partnerships.* Boston, Little Brown, 1952. 494 p. $12.50.

MacLaurin, John. *The United Nations and power politics.* New York, Harper, 1951. 468 p. $5.00.

Mandell, Irving. *How to protect and patent your invention; patent law.* New York, Oceana, 1952. 80 p. $2.00, (pap. $1.00).

Miller, Glen W. *Problems of labor.* New York, Macmillan, 1951. 560 p. $5.00.

Morris, Clarence. *Studies in the law of torts.* Brooklyn, N. Y., Foundation Press, 1952. $4.50. (A collection of articles previously published in the law reviews.)

National Association of Credit Men. *Credit manual of commercial law.* 1952 ed. The Author, 1951. $10.00.

Schroeder, Oliver, Jr. *The legal story of a lawsuit.* Cleveland, O., Western Reserve University Law School, 1951. 140 p. $3.75. (Materials prepared for first year course in Introduction to Law).

Schwartz, Louis B. *Law of free enterprise and economic organization.* Brooklyn, N. Y., Foundation Press, 1952. $9.00.

Shugarman, Abe L. *Accounting for lawyers.* Indianapolis, Bobbs-Merrill, 1952. 592 p. $15.00.

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BOOK REVIEWS

Hebrew Criminal Law and Procedure: Mishnah: Sanhedrin-Makkot, by Hyman E. Goldin. Wayne Publishers, Inc. 308 pp. $4.75.

Reviewed by NATHAN D. KAPLAN

Member of our Board of Managers, Mr. Kaplan has been practicing Law in Chicago since 1903. He is a former President of the Zionist Organization of Chicago.

In this small volume, the author presents what he terms "A true Translation and Faithful Interpretation of the Ancient Jewish Codes of Law." Part one is entitled "Crimes and their punishments; part two, "Mishnah Sanhedrin;" the third is called "Mishnah Makkot." It would be more accurate perhaps to describe this work as an earnest presentation of conflicting techniques of dealing with justice in the ancient Jewish codes of law.

The Mosaic law, which decrees punishment for certain "sins" or "averoth," identified by Mr. Goldin as "crimes" posed problems in the imposition of punishments. Subsequently to this law were added opinions of rabbis, scholars and commentators who recorded their own interpretations, many of which were contradictory.

It is difficult not to wish, reading this volume that more of historical background had not been incorporated, so that a clearer picture emerge, depicting the social, political and economic conditions prevalent prior to the promulgation of the Mosaic laws; of the changes that evolved as modifications developed and were incorporated into the mishnah and gemara. These to be commentated upon and to be reinterpreted, later, by Maimonides, Rashi and others.

Paucity of detail notwithstanding, this volume presents valuable information to the student of English and American law, who is trained to think of the common law of England as the source of our American legal system and of the Roman law as the source from which stemmed the stream of legal wisdom that supplied vigor to our English system of jurisprudence. Here we find that long before early England learned to ameliorate its cruel laws that meted out inhuman punishment for misdemeanors, that the Jewish legal system of jurisprudence was struggling with words and sentences in the Mosaic code, so as to make for a clear exposition of civilized rules of action. The author states:

"No matter how strongly the Jewish jurists were opposed to the principle of lax talionis (The Law of Retaliation) they could not override the Biblical injunction and abrogate it completely by substituting another punishment in its stead; nevertheless these lawmakers made every endeavor to so interpret the Biblical law, and make the legal restrictions so numerous that it became almost impossible to impose a death sentence."

The author quotes an anonymous commentator: "A Sanhedrin that executes capital punishment once in seven years, is considered tyrannical," and, another, Rabbi Eleazar Ben Azariah, adds: "Even once in seventy years."

As if to emphasize the lengths to which Jewish jurisprudence went in humanizing penalties for criminal offences, this volume recites details and techniques for inflicting several categories of punishment; tribunals are described, qualifications of prosecutors and witnesses are defined, the rights and responsibilities of kings and priests and the nature of each punishment with all of its horrifying detail. Through it all is evident an overall protection against miscarriage of justice which makes certain that the escape of the guilty is preferable to the conviction of the innocent.

Nothing in the history of Roman law nor in that of the English law prior to the abolition of subhuman punishment ever approximated such solicitude for liberal interpretation of Mosaic or other laws in defense of human life or property rights. Long before our system of trial by jury was conceived, the Jewish system of jurisprudence provided for trial before a tribunal of no less than three judges in minor cases and tribunals (Sanhedrin) of twenty three and of seventy-one Judges, in cases which involved the prospect of capital punishment, and where these were to be tried.

Conflicting opinions are cited as to the tribunal which should assume jurisdiction of certain categories of charges. The fact is apparent that here were early provisions for safeguarding a defendant against trial and judgment by a lesser body than that which may be comparable to our own jury of peers. That it antedates our Jury system and may well be the historic antecedent thereof is worthy of serious consideration.

The treatment of a long list of offences and punishment described in *Hebrew Criminal Law and Procedure* is buttressed with quotations from the Mishnah, and other scholarly sources which have for the modern law student but an academic interest. There are, too, provocative descriptions of wrongs and crimes against man and society considered such in the days of our ancestors and penalties meted out for same.

This volume makes clear that humane justice was the incessant concern of the Jewish people in their acceptance of the Torah, and in their interpretation of its commands to civilize barbaric concepts of primitive retribution only, into a system of justice superior to penal codes of all ages.

FINS ON APPEALS AND REVIEW

A thorough treatment of methods of appeals and review in the state of Illinois has been written by Member Harry G. Fins, lecturer and author.

A limited supply of this publication is available, free, to members of our Society. If interested, please write to Mr. Fins at 72 West Washington Street, Chicago 2, and ask for a copy of "Appeals and Writs in the State of Illinois."

Proposed Uniform Marriage and Divorce Laws

Members Matilda Fenberg, Harry X. Cole and Michael Levin participated in a panel discussion on a proposed Uniform Divorce Law before the National Association of Women Lawyers, February 24, at the Congress Hotel.

On March 6 the same subject was discussed by our members and others at a meeting before the Women's Bar Association of Illinois.

The Uniform Marriage and Divorce Law as drafted by Miss Matilda Fenberg is under consideration for approval by the Matrimonial Law Committee of the Chicago Bar Association of which Miss Fenberg is a member. The draft was approved by the committee as a whole and referred to the Board of Managers of the Chicago Bar Association for its consideration.

Members of our Society Michael Levin and Harry X. Cole, who are also members of the Chicago Bar Association, have been active in the work of revision and drafting of this bill.

IN MEMORIAM

Judge Benjamin P. Epstein was a man of whom Chicago could be proud. He was all that his fellow citizens could want in a judge—honest, brilliant, philosophical and understanding of other humans. He was a man of deep spiritual convictions, the kind of public servant so sorely needed in our uncertain times. . . .

—Chicago Sun-Times

* * * *

A brilliant legal career has been ended by the untimely death of Judge Benjamin P. Epstein. With his passing, Chicago lost a native son whose spirit will be sorely missed both in public affairs and in many civic activities. . . .

Judge Epstein leaves an unblemished record of service as a prosecutor, defense attorney, master in chancery, judge and chief justice of the Cook County Circuit Court. This record, and the faith of his fellow citizens in his character, are a durable memorial.

—The Chicago Daily News

LAW SCHOOL GRADUATES AND JOBS

. . . A survey of job-hunting experiences of the 1951 law-school graduates of the universities of Chicago, Harvard, Columbia and Yale is being jointly undertaken by the Commission on Law and Social Action of the American Jewish Congress and the New York State Committee for Equality in Education "to determine whether racial or religious discrimination is practiced against law school graduates seeking employment."

—The Chicago Bureau on Jewish Employment Problems

SORROW

The Decalogue Socety of Lawyers announces with deep regret the death of the following members:

Leonard J. Shapiro
William B. Spar

If we are to keep our Democracy there must be one commandment:
Thou shalt not ration justice.

—Judge Learned Hand

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Judge Tuohy on the Grand Jury System

The Civic Affairs Committee of The Decalogue Society of Lawyers was host to Judge William J. Tuohy of the Superior Court, March 19th, at our Society's headquarters, 180 West Washington Street. The Judge spoke on the Grand Jury system.

According to Judge Tuohy, the Grand Jury was created originally to protect innocent persons from the public airing against them of capricious charges. Under this theory of the institution, the Judge said, the proceedings were to be kept completely secret. Furthermore, no opprobrium was to attach to indictments alone; the charge had to be proved beyond a reasonable doubt.

The Judge said these wise rules can be traced directly to our fundamental political and religious beliefs in the rights of the individual and human dignity. Unfortunately, the Judge said, the majority of people today do not really believe in these rights and their corrollary, the presumption of innocence. Innocent people are now made to suffer because newspapers report the supposedly secret deliberations of the Grand Jury, and indictments alone are thought of as proved charges. The lawyer's responsibility is obvious, he insisted, he must fight to maintain the secrecy of the Grand Jury room to safeguard the individual's rights.

Judge Tuohy gave the gathering some practical observations culled from his experience as an assistant state's attorney, and later, as State's Attorney. The Judge emphasized the need of a courageous judge in the Felony Court, or other magistrate's court where the defendant is arraigned, who could dispose quickly of the large percentage of cases which should not be sent to the Grand Jury. The State's Attorney should not be encouraged to indict unless he has the evidence which will likely convict. The Felony Court judge must help in disposing of a large number of cases as misdemeanors. The success of the State's Attorney's office ought not to be measured by the number of indictments voted, since a large number of indictments will, more often, be an indication of a weak Felony Court judge.

In a majority of cases, Judge Tuohy said, the State's Attorney can dictate the result of deliberations in the Grand Jury room. The assistant in charge of presentations before the Grand Jury usually holds so much sway that he, not the foreman, can make appointments for the presentation of special matters to the Jury. After the Grand Jury votes a true bill, the Judge said, it almost always calls in the assistant state's attorney to draw up the exact charge. The State's Attorney the Judge asserted must take full responsibility for the performance of each one of his assistants.